

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

PHILLIP BERNARD CARTHEN,)	
)	
Petitioner,)	
)	
v.)	Case No. CIV-07-162-R
)	
GLENN BOOHER,)	
)	
Respondent.)	

ORDER

Petitioner , a state prisoner appearing pro se, filed this action seeking a writ of habeas corpus and/or mandamus, citing 28 U.S.C. § 1291, § 1651(a) and 2241 as the basis for this Court’s jurisdiction. Pursuant to 28 U.S.C. § 636(b)(1)(B), this matter was referred to United States Magistrate Judge Bana Roberts for preliminary review. On July 31, 2007, Judge Roberts issued a Report and Recommendation wherein she recommended that the petition be dismissed without prejudice, because Petitioner had failed to allege a viable basis for this Court’s jurisdiction. The matter is currently before the Court on Petitioner’s objection to the Report and Recommendation.¹

As a matter of law, the Court undertakes *de novo* review of those portions of the Report and Recommendation to which specific objection has been made. *See* 28 U.S.C. § 636 (b)(1)(C); *Summers v. State of Utah*, 927 F.2d 1165, 1167 (10 Cir.1991). The Court applies a “firm waiver rule,” which holds “that a party’s objection to the magistrate judge’s

¹ Petitioner filed an objection and objects to the substantive findings made by Judge Roberts. However, at page 8 of the objection Petitioner “PRAYS that the District Judge Russell will concur and dismiss this petition **without prejudice.**”

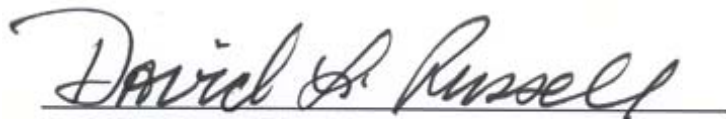
report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review.” *United States v. One Parcel of Real Property*, 73 F.3d 1057, 1060 (10th Cir.1996). Judge Roberts recommended that the petition be dismissed because Petitioner sought mandamus relief from State officials, which the court cannot do, and because Petitioner’s claims, which he attempted to characterize as arising under 28 U.S.C. § 2241, were only cognizable under 28 U.S.C. § 2254. Petitioner does not object to Judge Roberts’ recommendation with regard to the nature of mandamus relief and the Court’s inability to provide such relief. Petitioner instead argues that he is challenging the execution of his sentence in Case No. CF-2000-313, District Court of Payne County, not the conviction listed in the petition, Case No. CF-1994-61, District Court of Noble County..

Judge Roberts’ Report and Recommendation soundly rejected Petitioner’s theory that this action is brought pursuant to 28 U.S.C. § 2241 to challenge the execution of a sentence. She correctly concluded that Petitioner seeks to challenge a conviction that he has fully served and that he has previously and unsuccessfully challenged. Petitioner’s objection is devoted to attacking the merits of his conviction for knowingly concealing stolen property in Case No. CF-94-61, District Court of Noble County. Petitioner has previously pursued a § 2254 challenge to this conviction, and therefore he may not seek relief in this Court without leave from the United States Court of Appeals for the Tenth Circuit. *See* 28 U.S.C. §§ 1631, 2244(b)(3). Petitioner does not ask that the Court transfer this case to the Circuit,

rather, he argues that this is a § 2241 challenge to the later conviction from Payne County.²

Because Petitioner is challenging a conviction that he has previously challenged, and because he specifically disavows that he is seeking relief under 2254 for that conviction, the Court concludes that it lacks jurisdiction over Plaintiff's claims. Petitioner has not established a basis for this Court to exercise jurisdiction under 28 U.S.C. § 2241, and it is apparent that despite his representations to the contrary, that he is not challenging the execution of the conviction in CF-2000-313. District Court of Payne County. For the reasons set forth herein, the Report and Recommendation is ADOPTED IN ITS ENTIRETY and the petition is hereby DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED this 22nd day of August 2007.


DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

² Petitioner is currently serving a twenty-year sentence for the Payne County conviction.